



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 1209**

**[Document Number AMS-SC-18-0009]**

**Mushroom Promotion, Research, and Consumer Information Order;  
Reallocation of Council Membership**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule reallocates the membership of the Mushroom Council (Council) under the Agricultural Marketing Service's (AMS) regulations regarding a national research and promotion program for mushrooms. The Council administers the regulations with oversight by the U.S. Department of Agriculture (USDA). This rule was recommended by the Council after a review of the geographic distribution of the volume of mushroom production throughout the United States and the volume of imports. This rule revises the number of Council members in two of the four geographic regions under the program. This action is necessary to provide for equitable representation of producers and importers on the Council.

**DATES:** Effective Date: [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Marlene Betts, Marketing Specialist, Promotion and Economics Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue, SW., Room 1406-S, Stop 0244, Washington, DC 20250-0244; telephone: (202) 720-9915; facsimile (202) 205-2800; or electronic mail: Marlene.Betts@ams.usda.gov.

**SUPPLEMENTARY INFORMATION:** This rule affecting 7 CFR part 1209 is authorized under the Mushroom Promotion, Research, and Consumer Information Act of 1990 (Act) (7 U.S.C. 6101-6112).

**Executive Orders 12866, 13563, and 13771**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules and promoting flexibility. This rulemaking has been determined to be not significant for purposes of Executive Order 13563. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this rule does not meet the definition of a significant regulatory action it does not trigger the

requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs'" (February 2, 2017).

#### **Executive Order 13175**

This action has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation would not have substantial and direct effects on Tribal governments and would not have significant Tribal implications.

#### **Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 1930 of the Act (7 U.S.C. 6109) provides that it shall not affect or preempt any other Federal or State law authorizing promotion or research relating to mushrooms.

Under section 1927 of the Act (7 U.S.C. 6106), a person subject to an order issued under the Act may file a written petition with USDA stating that an order, any provision of the order, or any obligation imposed in connection with the order, is not established in accordance with the law, and request a modification of the order or an exemption from the order. Any

petition filed challenging an order, any provision of an order, or any obligation imposed in connection with the order, shall be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

### **Background**

This rule reallocates the membership of the Council established under the Mushroom Promotion, Research, and Consumer Information Order (Order). The Order (7 CFR part 1209) is administered by the Council with oversight by USDA. This action was recommended by the Council after a review of the geographic distribution of the volume of mushroom production throughout the United States and the volume of imports. This rule revises the number of Council members representing two of the four regions under the program. This action is necessary to provide for equitable representation of producers and importers on the Council.

Section 1209.30(a) specifies that the Council shall consist of not less than four or more than nine members who are mushroom producers and importers. Pursuant to § 1209.30(b), for purposes of nominating and appointing producers to the Council, the United States is divided into three geographic regions and the number of Council members from each region are currently as follows: (1) Region 1: All other States including the District of Columbia and the Commonwealth of Puerto Rico except for Pennsylvania and California - two members; (2) Region 2: Pennsylvania - four members; and (3) Region 3: California - two members. Pursuant to § 1209.30(c), importers are represented by a single, separate region, referred to as Region 4, when imports, on average, equal or exceed 50,000,000 pounds of mushrooms annually.

Section 1209.30(d) prescribes that, at least every five years, and not more than every three years, the Council must review changes in the geographic distribution of mushroom production volume throughout the United States and import volume, using the average annual mushroom production and imports over the preceding four years. The Council must recommend to the Secretary reapportionment of the regions and/or modification of the number of members from such regions as necessary to best reflect the geographic distribution of mushroom production

volume in the United States and representation of imports, if applicable.

Section 1209.30(e) prescribes a procedure to be used to determine the number of members for each region to serve on the Council, subject to the nine-member maximum limitation. Each region that produces, on average, at least 50,000,000 pounds of mushrooms annually is entitled to one representative on the Council. Importers are represented by a single, separate region, which is entitled to one representative, if the region imports, on average, at least 50,000,000 pounds of mushrooms annually. If the annual production of a region is greater than 110,000,000 pounds, but less than or equal to 180,000,000 pounds, the region must be represented by one additional member. If the annual production of a region is greater than 180,000,000 pounds, but less than or equal to 260,000,000 pounds, the region must be represented by two additional members. If the annual production of a region is greater than 260,000,000 pounds, the region must be represented by three additional members. Finally, if in the aggregate, regions are entitled to levels of representation that would exceed the nine-member limit on the Council, the seat or seats assigned shall be assigned to that region or those regions with greater on-average production or

import volume than the other regions otherwise eligible at that increment level.<sup>1</sup>

The Council met in February 2018 and reviewed the geographic distribution of mushroom production volume throughout the United States and import volume to assess whether reapportionment of the current regions or modification of the number of members from such regions, or both, were warranted. Table 1 below is based on Council assessment data for the preceding four years (2014 through 2017).

**Table 1. Analysis of Council Representation Based on Assessment Data.**

Region	Current Council Representation	2014 Pounds	2015 Pounds	2016 Pounds	2017 Pounds	4-year average	New Council Representation
IN MILLIONS							
1 (All other States)	2	202.7	205	203.8	196	201.9	3
2 (PA)	4	480.6	488	477.8	502.6	487.3	4
3 (CA)	2	109.5	102.3	106.7	91.2	102.4	1
4 (Imports)	1	98.8	110.1	119.3	132	115.1	1
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Table 2 below provides a similar analysis based on U.S. production data from USDA's National Agricultural Statistics Service (NASS) and import data from USDA's Global Agricultural Trade System (GATS).<sup>2</sup>

<sup>1</sup> On average means a rolling average of production or imports during the last two fiscal years, or such other period as may be determined by the Secretary.

<sup>2</sup> NASS United States Department of Agriculture (USDA) (2018) Quick Stats. U.S. Department of Agriculture, National Agricultural Statistics Service, Washington DC. <https://quickstats.nass.usda.gov/>

**Table 2. Analysis of Council Representation Based on NASS and GATS Data.**

Region	Current Council Representation	2014 Pounds	2015 Pounds	2016 Pounds	2017 Pounds	4-year average	New Council Representation
IN MILLIONS							
1 (All other States)	2	208.8	217.5	221.6	223.9	218.0	3
2 (PA)	4	571.7	584.0	587.4	577.6	580.2	4
3 (CA)	2	101.5	105.6	109.9	101.7	104.7	1
4 (Imports)	1	80.6	89.5	102.0	111.3	98.5	1
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**Council Recommendation**

Based on its analysis, the Council unanimously recommended increasing the number of members in Region 1 by one and decreasing the number of members in Region 3 by one. This action is necessary to provide for equitable representation of producers and importers on the Council. No changes are necessary to the number of members in Regions 2 and 4 or to the make-up of any of the regions. Section 1209.230 which is currently reserved, will be added accordingly.

**Final Regulatory Flexibility Act Analysis**

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), AMS is required to examine the impact of the

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**GATS** United States Department of Agriculture (USDA) (2018) Global Agricultural Trade System. U.S. Department of Agriculture, Foreign Agricultural Service, Washington DC. <https://apps.fas.usda.gov/gats/>

proposed rule on small entities. Accordingly, AMS has considered the economic impact of this action on such entities.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. The Small Business Administration (SBA) defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural service firms (importers) as those having annual receipts of no more than \$7.5 million.

It is estimated that there are about 120 mushroom producers in the United States and about 20 importers eligible to serve on the Council. The majority of these producers and importers would be considered small entities as defined by the SBA. Persons who produce or import organic mushrooms or who produce or import 500,000 pounds or less on average of mushrooms annually for the fresh market are exempt from the requirements of the Order.

This rule reallocates the membership of the Council under the Order. The Order is administered by the Council with oversight by USDA. This action was recommended by the Council after a review of the geographic distribution of the volume of mushroom production throughout the United States and the volume of imports. The rule revises the number of Council members in

two of the four regions under the program. This action is necessary to provide for equitable representation of producers and importers on the Council. Section 1209.230 which is currently reserved, is being added accordingly. Authority for this action is provided in § 1209.30(d) of the Order and section 6104 of the Act (7 U.S.C. 6104).

Regarding the economic impact of this rule on affected entities, revising the number of members in Regions 1 and 3 will impose no additional costs on industry members. Eligible producers and importers interested in serving on the Council will have to complete a background questionnaire. Those requirements are addressed in the section below titled Reporting and Recordkeeping Requirements. The changes are necessary to provide for the equitable representation of producers and importers on the Council.

Regarding alternatives, one option to the action regarding revising the number of Council members in two of four regions would be to maintain the status quo and not revise the number of Council members representing Regions 1 and 3. However, the Council's analysis of the assessment data and NASS and GATS data support the changes. USDA concludes that the changes are necessary and appropriate.

#### **Reporting and Recordkeeping Requirements**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the background form, which represents the information collection and recordkeeping requirements that are imposed under the program, have been approved previously under OMB number 0581-0093. The mushroom Order requires that two nominees be submitted for each vacant position. With regard to information collection requirements, producers and importers interested in serving on the Council must submit a background form (Form AD-755) to USDA to verify their eligibility for appointment to the Council. However, serving on the Council is voluntary, and the burden of submitting the background form would be offset by the benefits of serving on the Council.

As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information collection requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule. AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Regarding outreach efforts, this action was discussed by the Council at its meeting held in February 2018 where the

Council unanimously made its recommendation. All of the Council's meetings are open to the public and interested persons are invited to participate and express their views.

A proposed rule concerning this action was published in the *Federal Register* on February 11, 2019 (84 FR 3114). A 30-day comment period ending March 13, 2019, was provided to allow interested persons to submit comments.

### **Analysis of Comment**

Eight comments were received in response to the proposed rule. Of those eight comments, four comments supported the reallocation of Council members in two regions to more accurately represent the volume of production, one comment was opposed, and three comments were outside the scope of the rulemaking.

The comments that supported the proposed changes agreed with reallocating the number of members in two regions in order to more accurately represent the volume of production. Specifically, the comments supported increasing the number of member seats by one in Region 1 and decreasing the number of member seats by one in Region 3. In addition, the supporters recommended that the length of term for the new member in Region 1 be for a two-year term instead of the standard three-year term for the purpose of staggering the terms of the members representing Region 1. According to section 1925 of the Act (7

U.S.C. 6104) and § 1209.34 of the Order, members of the Council shall serve for terms of three years, except for members appointed to the initial Council. Since this is not the "initial" Council, members of the Council shall serve terms of three years, and therefore, the recommendation for a two-year term is not accepted.

One comment disagreed with the Council membership being determined based on geographic production volume. The commenter wants more diversification by type of mushroom growing method and suggests consideration of seats for growers specializing in farmers market distribution and those using sustainable agricultural practices. Section 1925 of the Act (7 U.S.C. 6104) and § 1209.30 of the Order state that the establishment and membership of the Council shall consider the geographical distribution of mushroom production throughout the U.S. and the comparative volume of mushrooms imported into the U.S. In addition, the Council has a diverse membership and has a policy to continuously pursue diverse representation in size of operations, experience of members, methods of production, and other factors to bring individuals with different perspectives to the Council. Further, the Council's meetings are open to the public and interested persons are invited to participate and express their views.

No changes have been made to the proposed rule based on the comments received.

After consideration of all relevant matters presented, including the information and recommendations submitted by the Council, the comments received, and other available information, it is hereby found that this rule, as hereinafter set forth, is consistent with and will effectuate the purposes of the Act.

**List of Subjects in 7 CFR Part 1209**

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Mushroom promotion, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 1209 is hereby amended as follows:

**PART 1209 – MUSHROOM PROMOTION, RESEARCH AND CONSUMER INFORMATION ORDER**

1. The authority citation for 7 CFR part 1209 continues to read as follows:

**Authority:** 7 U.S.C. 6101-6112 and 7 U.S.C. 7401.

2. Revise the heading for subpart B to read as follows:

**Subpart B—Administrative Requirements**

3. Section 1209.230 is added to read as follows:

**§ 1209.230 Reallocation of Council members.**

Pursuant to § 1209.30, the number of members on the Council shall be as follows:

(a) Region 1: All other States including the District of Columbia and the Commonwealth of Puerto Rico except for Pennsylvania and California — 3 Members.

(b) Region 2: The State of Pennsylvania — 4 Members.

(c) Region 3: The State of California — 1 Member.

(d) Region 4: Importers — 1 Member.

Dated: April 18, 2019.

Bruce Summers,  
Administrator.

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